Validity of a non-native title interest on a DOGIT

Murgha v Queensland [2008] FCA 33

Dowsett J, 25 January 2008

Issue

The issue before the Federal Court in this case concerned, essentially, whether declaratory orders should be made as to the validity of a lease purportedly granted under the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld) (Land Holding Act).

The area in question is in Queensland and forms part of a larger area subject to both a claimant application under the *Native Title Act 1993* (Cwlth) (NTA) and a deed of grant in trust (DOGIT). The court decided that, despite several irregularities, the lease was validly granted and declaratory orders should be made.

Background

The particular area in question in this case is part of Lot 207 on Plan NR 7310 (Lot 207) and lies east of Cairns. Most, if not all, of Lot 207 has been reserved for Aboriginal use for many years. In October 1986, Lot 207 was included in a DOGIT to the Yarrabah Aboriginal Council (now the Yarrabah Shire Council and referred to here as the council).

The DOGIT was a grant in fee simple in trust to be held for the benefit of Aboriginal inhabitants and for no other purpose. The DOGIT area is subject to a claimant application referred to here as the Combined Gunggandji claim. The 14th respondents to the Combined Gunggandji claim, Elaine and Darryl Pollard (the Pollards), claimed an interest in part of Lot 207 based on an application they made under the Land Holding Act for the grant of a lease over a part of Lot 207 that is referred to as Lot 13 on an unregistered survey plan (RC 159893).

As his Honour Justice Dowsett pointed out:

- consideration of the Combined Gunggandji claim would necessarily involve determining the effect of the interest the Pollards claimed to hold, which would in turn require determining the validity of that interest;
- other persons also claimed similar non-native title interests (the non-native title claims) in parts of the area subject to the native title claim;
- the non-native title claims were obstacles to the resolution of the Combined Gunggandji claim largely because the parties were unclear as to whether or not those making the non-native title claims were 'legally justified' i.e. whether the interest they claimed had been validly created under the relevant Queensland legislation, in particular under the Land Holding Act;
- for that reason, it was appropriate to determine the validity or otherwise of the non-native title claims in advance of the determination of the native title claim;
- in this case, the interested parties had effectively agreed that the Pollards' claim should succeed so the question for the court was whether it should grant appropriate declaratory relief—at [2] and [3].

Dowsett J set out ss. 5, 6, 9, 10 and 11 of the Land Holding Act to determine whether the Pollards were 'qualified persons' who could apply for, and be granted, a lease under that Act and also considered the role and duties of the council in granting security of tenure for qualified persons over a DOGIT area—at [4] to [8].

Material before the court

The history of the Pollards' claimed interest is factually complex and set out fully in the reasons for judgment. Briefly put, there was an exchange of correspondence between the Pollards and the council in the mid-1980s, which pre-dated the enactment of the Land Holding Act, in relation to an application they made for a block of land for farming purposes in another area. However, by mid 1986, the Pollards had decided they wanted to live closer to town and applied to the council for the land in which they now claim an interest i.e. the area identified as Lot 13 on the unregistered survey plan. By early 1987, the Pollards had started clearing the land. In April that year, Mr Pollard signed an application form for a grant under the Land Holding Act that had been filled out for him by the council's land clerk, apparently as a result of the council's letter of 24 March 1987 to those who had applied for grants to complete 'special new forms' at the council's office.

There were a number of irregularities in the way the form was filled out, including that the Pollards' three eldest children appeared to have be included as applicants for the grant despite not qualifying because they were not yet 18 years of age. The evidence was that the council's land clerk subsequently came to mark out the block.

In October 2002, Mr Pollard received a letter from the council's solicitor which:

- stated that the State of Queensland 'has now confirmed your entitlement' to the grant of a perpetual lease;
- informed them of the existence of the native title claim; and
- asked them whether they would accept the grant of the lease.

Mr and Mrs Pollard subsequently confirmed that they would accept the grant and Mr Pollard attended a meeting with state government surveyors where he was told that a lease would issue when the survey was complete. The unregistered survey plan was apparently a result of that meeting.

There were also minutes from three council meetings held in 9 March 1988, 1 June 1988 and 13 July 1988 that were relevant. Dowsett J drew an inference from these minutes, and other evidence, that the council approved the Pollards' application pursuant to the Land Holding Act at the latest on 13 July 1988.

Irregularities in exercise of statutory power

The court had some concern as to whether notice of the council's resolution to approve the Pollards' application (which was to be given within seven days pursuant to s. 6(1)(b) of the Land Holding Act) was given to the Pollards. Further, the state had been unable to locate any record of having received notice of the Pollards' application or the council's approval of it. Given no contemporaneous notice was given to the Pollards, his Honour thought it possible that no notice was given to the relevant minister either, which s. 6(1)(c) of the Land Holding Act required to be given within 28 days of council's approval of the application—at [21].

Dowsett J found that:

- the absence of notification was of no significance;
- nothing in the Land Holding Act supported the proposition that 'qualified persons' such as Mr and Mrs Pollard, who had an application approved by the council that entitled them to a lease, were liable to lose that entitlement because the council did not comply with its obligations to give notice under s. 6(1) of that Act—at [22].

However, his Honour had considerable concerns about irregularities in the application for the grant, particularly the fact that:

- Mrs Pollard had not signed it; and
- the underage, and therefore 'unqualified', children of Mr and Mrs Pollard were included on the form—at [23] to [25].

In these circumstances, Dowsett J decided that what was said in *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93] and [97] was of particular note i.e. the test for determining the effect of failure to comply with a statutory requirement that regulated the exercise of a statutory power was to ask whether the legislature intended that:

> [A]n act done in breach of the provision should be invalid...In determining the question of purpose, regard must be had to...the language of the relevant provision and the scope and object of the whole statute.
>
> Courts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act.

In light of those comments, and after consideration of s. 40 of the *Acts Interpretation Act (1954-1962)* (Qld) in relation to relief from strict compliance with prescribed forms, Dowsett J concluded that there was sufficient compliance with the requirements of the Land Holding Act and its associated regulations, particularly in the light of the fact that the council's land clerk filled out the application form for the Pollards—at [28] to [31].

The court's final concern was that the Pollards were absent from the leased area between 1994 and 2002. A lease under the Land Holding Act could, among other things, be forfeited under s. 22 of that Act if the leased area was not occupied 'by or on account of' the lessee for a continuous period of two years. His Honour concluded (among other things) that, while 'one might have expected that questions would have arisen concerning the possible operation of...s 22', it was for the council 'to act as it thought appropriate'. Therefore, the court was not required to take the matter further—at [32].

Decision

For the reasons summarised above, Dowsett J decided it was appropriate to grant declaratory relief. The proposed declarations are, essentially, that:

- on 13 July 1988 at the latest, the council determined to approve an application by the Pollards for a lease of the land described as Lot 13 on RC 159893;
- upon that determination, the Pollards became entitled to a lease in perpetuity of Lot 13, the land was divested from the council and so became Crown land within the meaning of the *Land Act (1962-1985)* (Qld); and

- the Pollards were then entitled to the grant of the lease of that land in perpetuity—at [33].

The court gave the parties an opportunity to make submissions as to orders and any other outstanding matters. On 25 January 2008, orders were made in the terms proposed in the reasons for judgment.